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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

DARREN “PETE” WHITE,

Plaintiff,

v.

CITY OF LOS ANGELES, ET AL.,

Defendants.

Case No.: 2:17-cv-3306-SJO-MRW

**PLAINTIFF’S MOTION IN LIMINE #4  
TO EXCLUDE EVIDENCE OF  
PLAINTIFF CURSING FOLLOWING  
HIS ARREST**

Date: August 21, 2018

Time: 9:00 a.m.

Dept.: 10C (Hon. S. James Otero)

*Complaint Filed: May 3, 2017*

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**NOTICE IS HEREBY GIVEN** that on August 21, 2018 at 9:00 a.m., or as soon thereafter as the matter may be heard in Department 10C of the above-entitled court, Plaintiff will move the Court for the following in limine order: that Defendants, their attorneys and any witnesses called by Defendants to testify at trial be precluded from introducing any evidence in the presence of the jury, whether testimonial or documentary, concerning Plaintiff cursing following his arrest.

Alternatively, Plaintiff requests that the Court issue an order requiring Defendant to make an offer of proof outside the presence of the jury and permit the Court to conduct a Federal Rule of Evidence § 104 hearing to determine whether the specific evidence sought to be introduced is proper.

The motion is based on this Notice of Motion, the Memorandum of Points and Authorities, and upon such additional oral and/or documentary evidence as may be presented in reply to the opposition of Defendant, if any, and at the hearing on the motion.

This motion is made following the meet and confer of counsel in accord with L.R. 7-3 which took place on July 12, 2018. The parties were unable to reach agreement as to the subject matter of this Motion in Limine.

Dated: July 17, 2018

Respectfully submitted,

LAW OFFICE OF CAROL A. SOBEL  
SCHONBRUN SEPLOW HARRIS & HOFFMAN LLP

By: /s/ Monique Alarcon  
Attorney for Plaintiff

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

In this 42 U.S.C. § 1983 action, Plaintiff alleges that his First Amendment rights to free speech and to be free from retaliation thereof were violated when Defendants unlawfully arrested him for recording police activity. Specifically, Plaintiff's claims include violations of: (1) First Amendment, freedom of speech; (2) Retaliation in violation of the First Amendment; (3) Fourth Amendment, unlawful seizure; (4) Fourteenth Amendment, liberty deprivation; (5) Bane Act violation; (6) False Imprisonment; and (7) False Arrest.

Both Plaintiff and Defendants have video recordings of the arrest at issue. Despite the claims of privilege that require a protective order, Defendants intend to introduce their body camera video at trial. Defendants intend to play the video recording of the arrest, and everything following the arrest. The video footage following the arrest depicts Plaintiff being marched through the streets in handcuffs to LAPD's Central Station. The video also depicts Plaintiff cursing at Sgt. Kinney for ordering his arrest. Plaintiff anticipates that Defendants will offer the evidence of Plaintiff cursing for no reason other than to prejudice Plaintiff, and elicit testimony concerning curse words from their witnesses and from Plaintiff himself. Defendants' counsel repeatedly elicited testimony at deposition about whether and what curse words were used. Because cursing at police is undoubtedly protected speech and unrelated to the underlying arrest, the probative value of such evidence is minimal and is substantially outweighed by the danger of unfair prejudice to Plaintiff.

### **II. EVIDENCE OF PLAINTIFF CURSING AFTER HE WAS ARRESTED IS IRRELEVANT AND SHOULD BE EXCLUDED**

Federal Rule of Evidence 402 states in pertinent part, "Irrelevant evidence is not admissible." Federal Rule of Evidence 401 provides that "evidence is relevant

1 if (a) it has any tendency to make a fact more or less probable than it would be  
 2 without the evidence; and (b) the fact is of consequence in determining the action."  
 3 *See Huddleston v. U.S.*, 485 U.S. 681, 682–92 (1988). The court has no discretion  
 4 to admit irrelevant evidence. *U.S. v. Dean*, 980 F.2d 1286, 1288–89 (9th Cir.  
 5 1992).

6 In this First Amendment false-arrest case, Plaintiff’s statements that were  
 7 made after the arrest are irrelevant. *Mackinney v. Nielsen*, 69 F.3d 1002, 1007 (9th  
 8 Cir.1995) (“Ninth Circuit law ... clearly establishes the right verbally to challenge  
 9 the police,” and “verbal protests [cannot] support an arrest under § 148”); *see also*  
 10 *Velazquez v. City of Long Beach* 793 F.3d 1010, 1022 (9th Cir. 2015) (“The  
 11 constitutional guarantee of free speech precludes criminalizing even strong  
 12 expressions of frustration or dislike, whether directed at a law enforcement officer  
 13 or someone else”) citing *United States v. Poocha*, 259 F.3d 1077, 1082 (9th Cir.  
 14 2001); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

15 Rather, the jury will have to decide whether Plaintiff’s conduct leading up to  
 16 the arrest was in violation of a lawful police order. A violation of Cal. Penal Code  
 17 § 148 requires that the criminal defendant “resist[ed], delay[ed], or obstruct[ed] a  
 18 police officer in the lawful exercise of his duties.” *Smith v. City of Hemet*, 394 F.3d  
 19 689, 695 (9th Cir. 2005). The jury must therefore make this determination based  
 20 on the relevant evidence that occurred before the arrest. Plaintiff’s statements of  
 21 profanity after his arrest are irrelevant and must be excluded.

22 **III. PURSUANT TO FED. R. EVID. 403, ALL EVIDENCE OF**  
 23 **PLAINTIFF CURSING FOLLOWING HIS ARREST SHOULD BE**  
 24 **EXCLUDED**

25 The Federal Rules of Evidence clearly provide that this Court may exclude  
 26 evidence when it is unfairly prejudicial. Specifically, relevant evidence may be  
 27 excluded “if it’s probative value is substantially outweighed by a danger of one or  
 28 more of the following; unfair prejudice, confusing the issues, misleading the jury,

1 undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R.  
2 Evid. 403.

3 Assuming evidence of Plaintiff cursing after he was arrested is marginally  
4 relevant, such evidence is substantially outweighed by the danger of unfair  
5 prejudice and should be excluded. Defendants may posit that Plaintiff's physical  
6 conduct during the arrest and the walk to the police station is relevant to the charge  
7 of resisting arrest. Although conduct after an arrest is irrelevant to any element of  
8 § 148, even assuming it's relevancy, Plaintiff's statements expressing disdain for  
9 the officer's arresting him is substantially outweighed by the danger of unfair  
10 prejudice.

11 This is particularly prejudicial when Plaintiff's statements are protected  
12 speech. "California law ... gives citizens considerable latitude in confronting the  
13 police." *Mackinney*, 69 F.3d at 1007 (citing *People v. Wetzel*, 11 Cal.3d 104, 107–  
14 09, 113 Cal.Rptr. 32, 520 P.2d 416 (1974)). Furthermore, Section 148 does not  
15 "criminalize [ ] a person's failure to respond with alacrity to police orders." *People*  
16 *v. Quiroga*, 16 Cal.App.4th 961, 966, 20 Cal.Rptr.2d 446 (1993); *see*  
17 *also Mackinney*, 69 F.3d at 1008 (holding that plaintiff's "refus[al] to comply for a  
18 matter of seconds" with police officers' "order [ ] to stop writing on the sidewalk"  
19 was not a violation of Section 148). *Velazquez*, 793 F.3d at 1019.

20 Though protected, there is a high likelihood that a jury would be prejudiced  
21 towards a civil rights Plaintiff cursing at a police officer. Even a limiting  
22 instruction explaining that such conduct is protected would be ineffective once the  
23 jury hears Plaintiff cursing on the videotape. *See, e.g., United States v. Layton*,  
24 767 F.2d 549, 551-56 (9th Cir. 1985) (an audiotape that had marginal probative  
25 value was properly excluded because it was highly inflammatory and unfairly  
26 prejudicial, and a limiting instruction would have been ineffective to overcome the  
27 improper impact of the tape).

28 //

1           Given the highly prejudicial nature of Plaintiff's statements, the Court  
 2 should exclude such evidence. If the court deny's Plaintiff's Motion in Limine #3  
 3 and admits evidence of Defendants' body camera video, Plaintiff asks that the  
 4 Court require Defendants to mute the audio of Plaintiff's statements once he is  
 5 handcuffed. Specifically, Plaintiff's statement that Sergeant Kinney arrested him  
 6 for videotaping and that he was a "piece of [expletive]" should be excluded, as well as  
 7 all of Plaintiff's statements following the arrest.

#### 8 **IV. CONCLUSION**

9           Based on the foregoing, Plaintiff respectfully requests that this Court grant  
 10 Plaintiff's Motion in Limine No. 4 and exclude evidence of Plaintiff cursing after  
 11 he was arrested.

12  
 13 Dated: July 17, 2018

14                               Respectfully submitted,

15                               LAW OFFICE OF CAROL A. SOBEL  
 16                               SCHONBRUN SEPLOW HARRIS & HOFFMAN LLP

17  
 18                               By:      /s/ Monique Alarcon       
 19   Attorney for Plaintiff